Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6179

ROBERT WHISENHUNT,

Petitioner

V.

STATE OF GEORGIA,

Respondent

WRIT OF CERTIORARI

TO THE

GEORGIA COURT OF APPEALS

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IN THE

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NO. _____

ROBERT WHISENHUNT, :
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Petitioner :
:
v. :
:
STATE OF GEORGIA, :
:
Respondent :

PETITION FOR WRIT OF CERTIORARI

TO THE

GEORGIA COURT OF APPEALS

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on June 15, 1978.

OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 146 Ga. App. 571.

JURISDICTION

The Judgment of Georgia Court of Appeals was entered on June 15, 1978. An application for rehearing was timely filed and denied on July 5, 1978. Copy of said denial is set forth in Appendix B hereto. Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on September 14, 1978. Copy of said denial is set forth herein in Appendix C. Mr. Justice Powell granted an extension of time on and including February 11, 1979, within which to file this Petition. The Court's jurisdiction is invoked under Title 28 United States Code §1257(3).

QUESTIONS PRESENTED

I. Whether Georgia's obscene device statute Ga. Code §26-2101(c), as written and/or as applied to Petitioner is unconstitutional?

II. Whether the jury instruction that "every person is presumed to intend the natural and necessary consequences of his act, therefore the law presumes that every act which is in itself unlawful was criminally intended" shifts the burden of proof from the State to the accused and relieves the State of proving all the necessary elements of the crime and therefore violates due process of the law?

III. Whether the jury charge on constructive knowledge is in violation of the constitutional minimal standards of scienter set out in Smith v. California, 361 U.S. 147, and is further in violation of the First and Fourteenth Amendments of the U.S. Constitution since it relieves the jury of finding actual knowledge?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Robert Whisenhunt, was charged in an accusation with violation of Ga. Code Ann. §26-2101(a) and (c) being the obscenity law and sale of devices for human sexual gratification. Prior to trial, several motions were filed (R-3-14). The Court overruled each and every motion (T-4,5,6) except the Motion to Suppress (T-18) on which he reserved judgment, but later overruled. The jury found Petitioner guilty, and the Court imposed a sentence of twelve (12) months on probation and a fine of Five Thousand ($5,000.00) Dollars.

Ira Brown, an investigator for the solicitor's office of Fulton County, testified that he went to the Plaza News Adult Book Store on October 7, 1976, and purchased two magazines (T-21,22). Brown also seized two bags of devices, State's exhibits 3 through 17, that were on display and in plain view (T-22,23). The Petition-

er was the only employee in the store, and was arrested. Brown stated that he saw most of the devices advertised in a magazine or a movie previously (T-46,50). The State rested.

Counsel renewed his Motion to Suppress which was overruled (T-61,62), and Petitioner objected to the admission of the evidence based on the Motion to Suppress (T-64).

The defense called Dr. J. Frank Clark, a clinical psychologist. Dr. Clark testified that a large part of his practice is in the area of sex counseling, and that he has written several papers on sex counseling methods (T-70,71).

Dr. Clark testified that the devices were not useful primarily for sexual stimulation (T-88). Dr. Clark testified that the devices, in their present form, would not be prescribed for sexual stimulation. Dr. Clark further testified that the magazine did not appeal to the prurient interest and the magazine had serious educational value.

The Court charged the jury in part that:

". . . a person had constructive knowledge of the obscene contents if he had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material." (T-142)

The Court also charged the jury that:

". . . a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act. . ." (T-141)

Counsel objected to the above instruction on the ground it shifts the burden of proving an element of the crime on to the defendant and therefore violates due process of law (T-148).

REASONS FOR GRANTING THE WRIT

I. Georgia's obscene device statute Georgia Code §26-2101(c), as written and/or as applied to Petitioner is unconstitutional.

Petitioner filed three pre-trial motions attacking the constitutionally of Ga. Code Ann. §26-2101(c) (Acts 1968, pp. 1249, 1302; p. 344; 1975, p. 498) on several different grounds. The Supreme Court of Georgia in Sewell v. State, 238 Ga. 495, denied the attack made on the statute that it was vague and overbroad. Petitioner's motions raised several grounds which the Georgia Supreme Court had not passed on the Georgia Court of Appeals did not discuss the issue. The main ground is that it is an invasion of privacy to deny an adult or a married couple the right to possess or purchase a device that could be used to stimulate the genital organs all in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the U.S. Constitution.

The second ground raised in the three motions is that such devices are not harmful per se, have a valid scientific and medical use, and therefore to make it a crime to possess such devices for personal consumption arbitrarily violates due process and the State of Georgia has no legitimate interest in regulating these types of devices since no harm can come from them and they could not be considered offensive or obscene such as books, movies, or printed material, and therefore do not come under the Miller v. California, 413 U.S. 15, test of obscenity.

Petitioner's basic attack is that the public or adults ought to have the right to purchase or possess devices that could stimulate their sexual organs. In Griswold v. Connecticut, 381 U.S. 479, the Court struck down a state statute that made it criminal to use contraceptives. In finding the law unconstitutional, the Supreme Court held that it infringed upon a protected right of privacy. It infringed upon the right to marital privacy since its prohibition could be extended to the use of contraceptive devices by married couples.

The prohibition in this case infringes upon the same fundamental right. The statute is not limited to prohibiting the sale

of such devices to minors or to unmarried persons. It merely sweeps all such devices together that could be used to stimulate the sexual organs, as criminal.

Secondly, there is no rational basis upon which the State may totally prohibit and impose criminal penalties for such devices.

The devices in the case at bar were not judged by the constitutionally accepted standards set out in Miller. The Court merely charged the jury that if they found the devices were designed or marketed as useful primarily for the stimulation of human genital organs they could convict the Petitioner. The three-part test in Miller was not considered by the jury.

In Pierce v. Society of Sisters, 268 U.S. 518, 636, the Supreme Court held an Oregon mandatory public school attendance statute invalid on the grounds that the statute had no reasonable relationship to some purpose within the competency of the state.

In Meyer v. Nebraska, 262 U.S. 390, the Supreme Court overturned a state statute prohibiting the study of the German language. The court held that the statute was arbitrary or without reasonable relation to some purpose within the competency of the state to effect. 262 U.S. at 399-400.

Even if one assumes that the state has an interest in regulating such devices, there is absolutely no rational basis for the total prohibition of these types of devices. See also Shelton v. Tucker, 364 U.S. 479.

As was stated in Griswold v. Connecticut, 381 U.S. 479, at 497, in Justice Goldberg's concurring opinion:

> ". . . the law must be shown 'necessary and not merely rationally related to the accomplishment of a permissible state policy,' McLaughlin v. Florida, 379 U.S. 187, 196."

The other constitutional grounds raised by the motions are urged, that is, the statute is overbroad, vague, and men of common sense and ordinary intelligence cannot determine what device may be considered illegal. See Gooding v. Wilson, 405 U.S. 518, Grayned v. Rockford, 408 U.S. 104.

Although this Court may not specify how a legislature is to meet legitimate social ends, it may prohibit the utilization of means that are unduly restrictive of individuals' freedom. Dean Milk v. Madison, 340 U.S. 349 (1951).

All of the above argument proceeds on the premise that the state has some legitimate interest in regulating the use to which sexual devices might be put. Petitioner does not concede that the State has any such interest. But, even if it does, no possible rational basis can be imagined for total prohibition of such devices. No conceivable public interest can be served by prohibiting an individual from purchasing an item to further his own masturbation or to utilize in sexual activities with his spouse.

II. The Court charged the jury as follows: "Every person is presumed to intend the natural and necessary consequences of his acts, therefore the law presumes that every act which is itself unlawful was criminally intended" shifts the burden of proof from the State to the accused and relieves the State of proving all the necessary elements of the crime and therefore violates due process of the law.

Petitioner argues that this instruction shifts the burden of proof to the accused and relieves the State of proving the necessary element of intent.

In Mann v. U.S., 319 F.2d 404, the Fifth Circuit struck down a similar charge. In Mann, the court felt such an instruction shifted the burden of proof from the government to the defendant. See also Berkovitz v. U.S., 213 F.2d 468; Wardlaw v. U.S., 203 F.2d 884; Block v. U.S., 221 F.2d 786.

When the trial judge charged that the law presumes that every act which is itself unlawful, unless the contrary appears, this places a burden on the Petitioner to present evidence to overcome this presumption.

In Chappel v. U.S., 270 F.2d 274, the Court struck down a charge almost exactly to the charge in the case at bar. The reason is clear. Where the accused denies he had specific intent to violate the law, the type of charge overrides the presumption of innocence, and relieves the State of providing an essential element of the crime charged. Compare Mullaney v. Wilbur, 421 U.S. 684.

Recently in U.S. v. Schelleci, 545 F.2d 519 , the Fifth Circuit again struck down an instruction which stated: "It is reasonable to infer that a person intends the natural and probable consequences of what he does nor knowingly fails to do unless some contrary intention appears from the evidence."

This instruction is almost on all fours with the instruction given in this instant case, and placed an impermissible burden on the Petitioner.

III. The jury charge on constructive knowledge is in violation of constitutional minimal standards of scienter set out in Smith v. California, 361 U.S. 147, and is further in violation of the First and Fourteenth Amendments of the U.S. Constitution since it relieves the State of proving actual knowledge and relieves the jury of finding actual knowledge.

The third question deals with the Court's charge on constructive knowledge (T-142). The jury was instructed in an improper manner upon the issue of scienter or knowledge on the part of the Petitioner.

The Court charged the jury that "a person has constructive knowledge of the obscene content if he had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material."

This instruction to return a guilty verdict upon finding "constructive knowledge" is patently erroneous when the current constitutionally minimal standards of scienter are considered. The most recent decision on the requirement of scienter is Hamling v. United States, 418 U.S. 87. There, the Court states:

> "We think the 'knowingly' language of 18 U.S.C. §1461 and the instructions given by the district court in this case satisfy the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show the defendant had knowledge of the contents of material he distributed, and that he knew the character and nature of the materials."

As Hamling clearly reflects, the Constitution requires a finding of actual rather than constructive knowledge. The requirement of actual knowledge is necessary to eliminate the chilling effect which will flow from any lesser standard. Smith v. California, 361 U.S. 147. As stated in Mishkin v. New York, 383 U.S. 502:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent to the definition of obscenity."

The present constitutional minimum standard of scienter require actual knowledge. The trial court erroneously instructed the jury that a finding of guilty could be predicated upon constructive knowledge. This violated Petitioner's rights derived from the First and Fourteenth Amendment of the United States Constitution. These rights cannot be abrogated by any Georgia statute. Also the above instructions violated due process of law and they relieved the State of proving an essential element of the crime charged.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

RESPECTFULLY SUBMITTED,

GLENN ZELL, Attorney for Petitioner

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(404) 524-6867

CERTIFICATE OF SERVICE

I, Glenn Zell, hereby certify that I have served a copy of the foregoing Petition on Hinson McAuliffe, Solicitor General Fulton County State Court, by placing same in the U.S. Mail, properly addressed with adequate postage affixed.

This _____ day of February, 1979.

GLENN ZELL

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APPENDIX "A"

IN THE INTEREST OF TIME, THIS OPINION IS SENT TO YOU WITHOUT PROOFREADING OR OTHER FINAL INSPECTION. IT WILL BE APPRECIATED IF COUNSEL WILL NOTIFY THE CLERK OF THE DISCOVERY OF TYPOGRAPHICAL ERRORS.

55640. WHISENHUNT v. THE STATE. E-82

BELL, Chief Judge.

Defendant was convicted of selling an obscene magazine and possessing obscene devices with the intent to sell in violation of Code § 26-2101. Held:

1. Defendant's witness, a clinical psychologist, testified that the devices in issue were not designed and marketed as useful primarily for sexual gratification and would not be prescribed by doctors for that purpose. But this same witness was not allowed to testify that in his opinion they would be primarily purchased as a joke-type novelty. The issue to be decided by the jury in this case is whether the devices were designed or marketed as useful primarily for stimulation of human genital organs and thus obscene. Code § 26-2101(c). Whether someone may purchase them as a joke was a matter not germane to that issue. Therefore, it was not error to exclude that testimony.

2. Defendant's enumerations of error with reference to his motion to suppress, parts of the charge to the jury and the constitutionality of Code § 26-2101(c) all raise identical issues which have been decided adversely to him in Sewell v. State, 238 Ga. 495 (233 SE2d 187); Dykes v. State, 232 Ga. 81 (209 SE2d 166); Nunnally v. State, 235 Ga. 693 (221 SE2d 547) and Pierce v. State, 239 Ga. 844 (SE2d).

Judgment affirmed. Shulman and Birdsong, JJ., concur.

APPENDIX "B"

Court of Appeals of the State of Georgia

ATLANTA, July 5, 1978

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

55640. Robert Whisenhunt v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA JUL 5 - 1978

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Morgan Thomas CLERK.

APPENDIX "C"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 9/4/78

Dear Sir:

Case No. 34027. Whisenhunt v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX "D"

CONSTITUTIONAL PROVISIONS

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law . . . abridging the freedom of speech, or the press. . ."

2. The pertinent provisions of the Fourth Amendment are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fifth Amendment are:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

4. The pertinent provisions of the Ninth Amendment are:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

5. The pertinent provisions of the Fourteenth Amendment are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to any person within its jurisdiction the equal protection of the laws."

78-6179

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ROBERT WHISENHUNT,

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v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I N D E X

TABLE OF AUTHORITIES

Cases Cited:

Statutes Cited:

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I.

Is Ga. Code Ann. § 26-2101(c), which prohibits the sale or other dissemination of certain defined obscene devices, constitutional?

II.

Was the jury instruction on intent under Ga. Code Ann. § 26-604 constitutional?

III.

Was the jury instruction on the knowledge required for a conviction under Ga. Code Ann. § 26-2101 constitutional?

STATEMENT OF THE CASE

On October 7, 1976, Ira W. Brown, an investigator in the Fulton County Solicitor's Office, entered the Plaza News and Adult Bookstore. (T. 19).[1] Investigator Brown purchased two magazines entitled Slurppy Time Girls and Gay Sex Devices from Petitioner Robert Whisenhunt. (T. 21-22).

Investigator Brown then identified himself and placed Whisenhunt under arrest. (T. 29). The officer then seized paraphernalia openly displayed inside the store.[2] (R. 2, T. 22-28).[3]

Petitioner was charged with distribution and possession of obscene material in violation of Ga. Code Ann. § 26-2101. (R. 3). He was tried and convicted on September 19, 1977, and sentenced to 12 months imprisonment and a $5,000.00 fine. The prison term was thereafter probated upon payment of the fine. (R. 20).

Whisenhunt appealed to the Court of Appeals of Georgia which affirmed his conviction. Whisenhunt v. State, 146 Ga. App. 571, 246 S.E. 2d 691 (1978). The Supreme Court of Georgia denied the petition for writ of certiorari.

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[1] T. refers to the transcript of Petitioner's trial in the State Court of Fulton County, Georgia.

[2] Among the items seized were two air pump penises, one anal tip vibrator, one dual anal tip vibrator, three dildos, six dildos with straps, four double dildos, five electric ball vibrators, four dildos with cranks, nine vibrators, five vibrators with attached sleeves, six artificial vaginas, two artifical vaginas with vibrators, one artificial vagina and rectum, two vaginal aid sleeves, two vaginal aid sleeves with attached vibrators and 14 vibrator kits.

[3] R. refers to the appellate record prepared by the Clerk of the State Court of Fulton County, Georgia.

REASONS FOR NOT GRANTING THE WRIT

I. GA. CODE ANN. § 26-2101(c), WHICH PROHIBITS THE SALE OR OTHER DISSEMINATION OF CERTAIN DEFINED OBSCENE DEVICES, IS CONSTITUTIONAL.

Petitioner attacks the constitutionality of Ga. Code Ann. § 26-2101(c) on the ground that it is an invasion of privacy and that the proscribed devices are not harmful per se.

Petitioner does not contend that the sexual devices are expression constitutionally protected. The issue of whether sexual devices, such as dildos, are expression protected by the First and Fourteenth Amendments, was presented to this Court on appeal and dismissed for want of a substantial federal question. See Sewell v. Georgia, ___ U.S. ___, 56 L. Ed. 2d 76 (1978); Simpson v. Georgia, ___ U.S. ___, 58 L. Ed. 2d 233 (1978).

Artificial sexual organs or extensions have been held to be devices designed and adapted for indecent or immoral use under 18 U.S.C. § 1462 and thereby obscene. United States v. Gentile, 211 F. Supp. 383 (D. Md. 1962). The language in 18 U.S.C. § 1462 has been held to be constitutional. United States v. Orito, 413 U.S. 139 (1973). A state court has applied an obscenity statute to artificial penises. People v. Clark, 304 N.Y.S. 2d 326 (1969).

Ga. Code Ann. § 26-2101 does not encompass conduct that is constitutionally protected and does not infringe upon the right of privacy, as it does not fall within the prohibition announced in Stanley v. Georgia, 394 U.S. 557 (1969). See also Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. Orito, 413 U.S. 139 (1973).

Petitioner correctly asserts that the standards or guidelines set forth in Miller v. California, 413 U.S. 15 (1973), used in

determining obscenity in press materials, do not apply to the devices described and prohibited by § 26-2101(c). The Miller guidelines were set up by this Court to be used in protecting the rights guaranteed by the First Amendment to the Constitution of the United States, freedom of speech and freedom of press. The devices prohibited by § 26-2101(c) are neither speech nor press materials and are, therefore, not protected by the First Amendment.

Petitioner compares the Georgia obscenity statute with that dealt with by this Court in Griswold v. Connecticut, 381 U.S. 479 (1965). However, in Griswold, this Court dealt with statutes prohibiting the use of contraceptives and recognized a distinction between "forbidding the use of contraceptives rather than regulating their manufacture or sale." Id. at 485.

The Georgia statute does not blanketly prohibit the use of devices described in § 26-2101(c). There is an exception whereby persons, married or single, can avail themselves of such devices. See Ga. Code Ann. § 26-2101(e). The procedure required in this exception is similar to that required for the dispersing of most prescription drugs, including those for birth control.

The devices described in Ga. Code Ann. § 26-2101(c) do not constitute protected expression and do not infringe upon any right of privacy; therefore, the State of Georgia may lawfully regulate these devices.

II. THE JURY INSTRUCTION ON INTENT UNDER GA. CODE ANN. § 26-604 WAS CONSTITUTIONAL.

The trial court's instruction on intent, incompletely and inaccurately quoted in Petitioner's brief, was as follows:

> . . . The acts of a person of sound mind and discretion are presumed to be the product of the person's will. This presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act. This presumption may be rebutted. A person will not be presumed to act with criminal intention, but you may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

(T. 141). The trial court had previously instructed the jury that the state had the burden of proving beyond a reasonable doubt every material allegation of which Petitioner stood accused and that the Petitioner was presumed innocent until that presumption was overcome by sufficiently strong evidence. (T. 138-39).

Petitioner alleges that the instructions shifted the burden of proof to the accused and relieved the state of the burden of proving the element of intent. (Petitioner's Brief, p. 6).

Of course, an instruction to the jury may not be judged in isolation but must be viewed in the context of the charge as a whole. Cupp v. Naughten, 414 U.S. 141 (1973).

Petitioner cites numerous Fifth Circuit cases in support of his allegation that the charge in question was burden-shifting. However, in United States v. Trexler, 474 F. 2d 369 (5th Cir. 1973), that court said:

> . . . While we do not permit a jury charge which shifts the burden of proof to the defendant through the use of a presumption, this Circuit does approve an instruction permitting the jury to infer intent from the natural and probable consequences of a defendant's acts.

Id. at 371. (Citations and footnote omitted).

Viewing the charge as a whole, as must be done, it is clear that the trial court instructed the jury that the burden of proving all elements of the offense remained with the state and that Petitioner would be entitled to an acquittal until the state overcame the presumption of innocence beyond a reasonable doubt. (T. 138). The instruction complained of was not burden-shifting and plainly instructed the jury that the state bore the burden of proving the elements of the offense charged.

III. THE JURY INSTRUCTION ON THE KNOWLEDGE REQUIRED FOR A CONVICTION UNDER GA. CODE ANN. § 26-2101 WAS CONSTITUTIONAL.

An essential element in the crime of distributing obscene materials in Georgia is that the accused knows the "obscene nature" of the material. Ga. Code Ann. § 26-2101(a). Knowing is defined as either actual knowledge of the obscene contents or "knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material." Id. At Petitioner's trial, the judge charged the jury concerning these principles. (T. 142).

Previous appeals that such a charge is unconstitutional have already been dismissed by this Court for want of a substantial

federal question. See Sewell v. Georgia, ___ U.S. ___, 56 L. Ed. 2d 76 (1978); Teal v. Georgia, ___ U.S. ___, 56 L. Ed. 2d 79 (1978); Simpson v. Georgia, ___ U.S. ___, 58 L. Ed. 2d 233 (1978). Also, this Court has recently denied writs of certiorari concerning this issue. See Wood v. Georgia, ___ U.S. ___, 58 L. Ed. 2d 247 (1978); Allen v. Georgia, ___ U.S. ___, 56 L. Ed. 2d 247 (1978).

The trial court's charge is consistent with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when this Court held that the person charged with the offense of mailing obscene material must know or have notice of the contents of the material.

> The inquiry, in proceedings under the [obscenity] statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. [Emphasis added]. Rosen v. United States, 161 U.S. 29, 41 (1896).

The Georgia statute is similar to New York statutes dealt with by this Court in Mishkin v. New York, 383 U.S. 502 (1966) and Ginsberg v. New York, 390 U.S. 629 (1968).

The Mishkin case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter" and it defined the required mental element in these terms:

> . . . A reading of the statute [Section 1141] as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . . Mishkin v. New York, 383 U.S. at 510. See also Ginsberg v. New York, 390 U.S. at 644.

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while § 1141 of the New York Penal Law requires the accused to be "in some manner aware." The statute dealt with in Ginsberg defined knowingly as "knowledge" of, or "reason to know" of the character and the content of the material.

Neither Mishkin nor Ginsberg required actual knowledge of the obscenity of the material. Both cases were reviewed and followed in Hamling v. United States, 418 U.S. 87 (1974), where this Court construed 18 U.S.C. § 1461, and held:

> To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. § 1461 nor by the constitution. Id. at 123-24.

In the case of Kuhns v. California, 431 U.S. 973 (1977), this Court denied a petition for certiorari to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter. . . ." California v. Kuhns, 61 Cal. App. 3d 735, 132 Cal. Rptr. 725, 737 (1976).

Proof of scienter may be made by circumstantial evidence. To prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material is proof of knowledge of the character of the material by circumstantial evidence.

At Petitioner's trial, Georgia law required and the jury was instructed that the state had to prove, as a bare minimum, that Petitioner had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" was required by Rosen v. United States, supra; "in some manner aware" was sufficient in Mishkin v. New York, supra; "reason to know" was sufficient in Ginsberg v. New York, supra; "be aware of the character of the matter" was sufficient in California v. Kuhns, supra; and proof of knowledge of the legal status of the material was not required. Hamling v. United States, supra.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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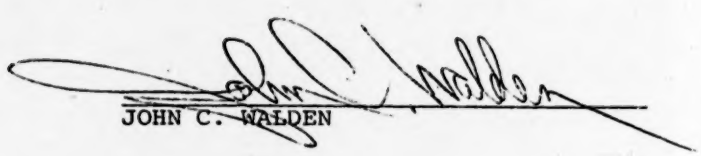
CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

Mr. Glenn Zell
Attorney for Petitioner
Suite 620
66 Luckie Street, N.W.
Atlanta, Georgia 30303

This 9th day of March, 1979.



JOHN C. WALDEN